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IN THE

Supreme Court of the United States

October Term, 1961.

No. 830.

RAY GRIFFITH HOOVER and PHOENIX IRON AND STEEL COMPANY,

Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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April 30, 1962.

I. F. Huntzinger Co., *Appellate Printers*, Camden, N. J.

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OPINIONS BELOW.

The opinions of the Court of Common Pleas No. 1 of Philadelphia County are not officially reported but they appear in full in the Record in the Court below at pages 253a to 266a.

The opinion of the Supreme Court of Pennsylvania is reported at 405 Pa. 642 (1962).

JURISDICTION.

In the trial court, a Court of Common Pleas of Philadelphia County, the plaintiff, Ray Griffith Hoover, was awarded a verdict of $50,000 against both defendants, the Phoenix Iron and Steel Company and The Pennsylvania Railroad Company. The Railroad appealed to The Pennsylvania Supreme Court. Phoenix did not appeal from the judgment entered in favor of Hoover and against it but did oppose the Railroad's appeal. Hoover filed no brief and made no oral argument in the Pennsylvania Supreme Court.

On January 2, 1962, the Supreme Court of Pennsylvania sustained the Railroad's appeal and entered judgment in its favor. Hoover's judgment against Phoenix was not disturbed. Thereafter Phoenix filed a motion for reargument and on January 30, 1962 the Pennsylvania Supreme Court denied that motion.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether either

(a) a defendant (Phoenix) whose rights and obligations are unrelated to the Federal Employers' Liability Act and who is not a party to the judgment entered in the court below, or

(b) a plaintiff (Hoover) who did not oppose the Railroad's contentions relating to the Federal Employers' Liability Act in the Pennsylvania Supreme Court and who has recovered his damages in a judgment against another defendant (Phoenix);

has legal standing to petition this Court for certiorari.

2. Whether a decision by the Pennsylvania Supreme Court that

(a) the evidence supported a finding that the sole cause of an accident was the admitted negligence of one defendant (Phoenix) in obstructing a railroad track, and

(b) the evidence did not support a finding that the other defendant (Railroad) was negligent in bringing its train to an emergency stop to avoid the obstruction,

merits review by this Court where the decision turns solely upon an analysis of unique facts, is consistent with all relevant case law and involves nothing more than a question of whether one defendant whose rights and obligations are controlled by the common law, can obtain contribution from the other.

STATUTE INVOLVED.

The statute claimed to be involved is the Federal Employers' Liability Act, 35 Stat. 65, as amended by 53 Stat. 1404, 45 U. S. C. §51, *et seq.*, the text of which is set forth in Petitioner's petition at page 4.

STATEMENT OF THE CASE.

On January 26, 1957 at about 8:15 A. M., Hoover was the flagman in the last car of the Railroad's eighteen-car passenger train known as "The Broadway Limited". He was thrown and injured when the train was brought to an emergency stop in a successful effort to avoid a collision with a gondola car of Phoenix, which has a plant, with extensive railroad siding tracks, about a mile east of Harrisburg, Pennsylvania. The gondola, although still on Phoenix's own tracks adjacent to the Railroad's main line track, had been tilted toward the Railroad's tracks by the admitted negligence of a Phoenix crew just as the eastbound Broadway Limited was approaching. Hoover instituted suit against Phoenix for its negligence, under the common law, and against the Railroad, under the Federal Employers' Liability Act, 35 Stat. 65, as amended by 53 Stat. 1404, 45 U. S. C. §51 *et seq.*

The action was tried in a Court of Common Pleas, Philadelphia County, where it was stipulated that plaintiff was entitled to $50,000 damages. On the issue of liability the jury returned verdicts against both defendants. The Railroad filed motions for judgment n. o. v. and for a new trial and these motions were denied by the Trial Judge, Edward

J. Griffiths. A dissenting opinion was written by President Judge Peter F. Hagan. Judgment was thereafter entered against the Railroad, which appealed to the Pennsylvania Supreme Court. Phoenix filed no post-trial motions in the trial court, took no appeal to the appellate court and Hoover's judgment against it became final and unappealable. After being presented with briefs and oral arguments on behalf of Phoenix and the Railroad (Hoover not participating), the Pennsylvania Supreme Court, in a unanimous opinion written by Justice Michael A. Musmanno, entered judgment in favor of the Railroad notwithstanding the verdict on January 2, 1962. The opinion analyzed the evidence and found that it did support a finding that the sole cause of the accident was Phoenix's negligence and that it did not support a finding of any Railroad negligence. Phoenix's motion for reargument was denied on January 30, 1962.

All the factual witnesses at trial were called by Hoover. Phoenix and the Railroad each called one expert witness to testify, hypothetically, on stopping distances.

Phoenix's negligence was established by its own conductor. He testified that his crew backed a draft of 10 or 12 cars to couple to a standing car (39a-41a). When the draft of moving cars struck the standing car they did not couple as they should have (40a-41a). The standing car was set in motion, and thereafter struck another Phoenix gondola which the same crew had parked earlier, without applying its brake (42a-43a). Although that parked gondola was loaded with steel plates (70a-71a), it was hit hard enough to tilt it away from the Phoenix plant and toward the Railroad's main line track (41a-45a). Phoenix's conductor immediately went around the tilted gondola and saw that it was a hazard to the Broadway Limited which he testified was approaching at a speed of 30 to 40 miles per hour (50a, 74a-76a). There was no time to call the Rail-

road on the nearby telephone (48a) so he ran down the tracks for 3 to 5 seconds waving his conductor's card at the oncoming train (46a, 74a). The Broadway Limited came to a stop with the engine and two cars past the side of the tilted Phoenix gondola (47a). The distance between the sides of the stopped cars of the Broadway Limited and the tilted gondola was about an inch or an inch and one-half (26a, 89a, P-4 (244a), P-6 (245a)).[1] After the presentation of all the evidence, Phoenix admitted its negligence (201a-202a).

The Railroad crew[2] testified that the Broadway Limited was picking up speed (32a, 85a, 102a-103a) and had reached 30 to 35 miles per hour (32a, 85a) as it moved east on tracks which curved to the north (or left as the train moved east) and passed under the Dock Street Bridge.[3] This Bridge was later shown by measurements to be 810 feet (168a) or 814 feet (13a) from the western end of the tilted gondola.

With the train rounding the curve the engineman could not have seen the tilted gondola until approximately 240 feet from it (105a-106a).[4] When he saw the obstruction he applied the emergency brake and came to a stop in about 600 feet (86a, 87a, 92a, 93a, 94a). The front of the train

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[1] Hoover's photographs P-4 (244a) and P-6 (245a) show the tilted gondola and the Broadway Limited in place after the accident.

[2] Hoover had taken the discovery deposition of Engineman Bittner twenty-two months before the trial and read it into evidence. Bittner was temporarily hospitalized at the time of the trial and the Railroad requested a continuance. This motion was refused. The refusal of the Railroad's motion for a new trial because of the denial of its motion for a continuance was not passed upon by the Pennsylvania Supreme Court since it entered judgment n. o. v.

[3] The scene of the accident is well portrayed by a survey, P-1 (241a), and photographs marked P-2 (242a) and P-3 (243a).

[4] The curve straightens out about 225 feet from where the gondola was tilted (16a).

was then stopped with its engine and two cars east of the west end of the tilted gondola.[3]

The application of the emergency brakes prevented contact between the Broadway Limited and the Phoenix gondola by substituting a back-and-forth action on the cars of the train for their normal lateral swaying (89a, 104a).

The fireman, having checked the six separate signals which assured him that the track ahead was clear (97a-98a),[4] had gone to the rear of the engine to increase the flame in the boiler, the flame having been previously lowered by him to decrease the danger of fires while the Broadway Limited was in the Harrisburg Station (98a). In addition to the fact that the Phoenix conductor said the train was coming under the Bridge when the gondola was tilted toward the Railroad's tracks (50a), the fireman testified that even if he had been in the cab of the engine he would not have been able to see the Phoenix gondola until the train was at the Dock Street Bridge (117a-118a).

The only witness called by the Railroad, a road foreman, testified hypothetically that if the train were going 30 miles per hour it would take about 600 feet to make an emergency stop and about 1,000 feet to make a service stop (152a, 149a).

An engineman testified hypothetically on behalf of Phoenix that if the train were going 30 miles per hour it would take about 400 to 500 feet to make an emergency stop (177a) and about 750 feet to make a service stop (174a).

In summary, the three witnesses who estimated the speed

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[3] The engine and two cars of the train plus the tilted gondola at 80 feet each (87a, 33a, 105a) would be about 220 feet.

[4] Since the tilted Phoenix gondola did not touch the Railroad's tracks, it did not activate the system of electronic signals which would have warned the oncoming train of an obstruction on the tracks (129a-130a, 165a).

of the train agreed upon a minimum of 30 miles per hour and a maximum of 40 miles per hour.[7] The two witnesses who testified to the minimum distance required for a service stop were asked only to use 30 miles per hour as the basis for their opinions. One estimate was 1,000 feet and the other was 750 feet, with a recognition that a greater distance would be required if the train were accelerating (181a-182a). The three witnesses who testified on that subject agreed that the train was, in fact, picking up speed. On the evidence, therefore, the shortest distance within which the train might possibly have stopped by use of the service brake was something more than 750 feet and the earliest the obstruction might conceivably have been seen by anyone on the engine was when it was 810 to 814 feet away. Combining this accurately obtained measurement with the minimum estimates of speeds and stopping distances and ignoring the facts that Hoover himself proved: (a) that the engineman could not see the obstruction until the train was 240 feet from it and (b) that the fireman was properly performing his duties in the rear of the engine, Phoenix contended, in the trial court and in the court below, that the factfinders should be permitted to find the train operators liable for failing to take a chance on a service stop which might or might not have stopped the train something less than 64 feet short of the tilted gondola. The contention that the Railroad was negligent in making an emergency application of the brakes, and should have made a service application of the brakes, ignored the fact that even with the emergency application of the brakes that was made the train had been unable to come to a stop before the engine reached the tilted gondola. It also assumed that the first move toward a service application of the brakes should and could have been made as soon as the engine passed the

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[7] The speed limit was 75 miles per hour (84a)

Dock Street Bridge; however, even if the fireman had been in the front of the engine and had seen the danger of the Phoenix gondola when the train was at the Dock Street Bridge he could only have called a warning to the engineman and an emergency stop was still a necessity. The Supreme Court of Pennsylvania unanimously agreed that, on the evidence, Phoenix could not impose any part of its responsibility for Hoover's damages on the Railroad.

STATEMENT OF RESPONDENT'S POSITION.

The petition for writ of certiorari should be denied for the following reasons:

Phoenix Iron and Steel Company has no legal standing to seek a review of the order of the court below. Phoenix seeks a review of a question which it claims arises under the Federal Employers' Liability Act. But Phoenix is not a railroad employee and its obligations in the present case arise under the common law of Pennsylvania and are in no way controlled by any federal statute.

Hoover has no standing to seek a review of the order of the court below. Hoover obtained a final judgment against Phoenix, a solvent corporation, which either has been or can be collected at his will. Any issue between Hoover and the Railroad is completely moot as was evidenced by Hoover's *lack of participation in the proceedings in the* Pennsylvania Supreme Court.

The question presented does not merit review. The decision below was fully justified and was based solely upon an analysis of the unique facts of the accident. The decision does not involve any new application of the Federal Employers' Liability Act but is, rather, consistent with all decisions of this Court which have interpreted that Act.

ARGUMENT.

I. Petitioners have no legal standing to petition for a Writ of Certiorari.

In the present case Phoenix purports to complain about the application of the evidence to the Federal Employers' Liability Act. The rights and obligations of Phoenix in the present case are, however, controlled by the common law of Pennsylvania. Phoenix cannot challenge the application of the statute as between Hoover and the Railroad: *Tileston v. Ullman*, 318 U. S. 44 (1943); *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Association*, 276 U. S. 71 (1928); *Heald v. District of Columbia*, 259 U. S. 114 (1922). Phoenix has no standing in this Court in this case and its efforts to make its common law rights and duties appear to involve the Federal Employers' Liability Act are without a sound foundation.

On the other hand, Hoover has obtained a final judgment against Phoenix which has been or can be collected at his will. He presented no brief or oral argument to the Pennsylvania Supreme Court and, so far as he is concerned, the present case is, and has been for some time, entirely moot.* Hoover has no standing to request a review by this Court since, in order to be heard in this Court, the

* Before instituting the present case in the state court against both Phoenix and the Railroad, Hoover had started suit against the Railroad alone, on the same cause of action, in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 23188. The Railroad, there, joined Phoenix as a third party defendant. Since obtaining his recovery against Phoenix in the present state court suit, Hoover permitted his federal court action to be dismissed for want of prosecution as of February 9, 1962.

question must have been raised in the state court by the party who seeks to have it reviewed: *Sully v. American Nat'l Bank*, 178 U. S. 289, 297 (1900); see also *Puget Sound Power & Light Co. v. County of King*, 264 U. S. 22, 25 (1924). Hoover made no argument whatsoever when the case was before the Pennsylvania Supreme Court and he has, therefore, no standing to complain of its decision and no more than an academic interest in any opinion this Court might render in this case.

II. The Pennsylvania Supreme Court correctly analyzed the evidence relating to this unusual accident. There is no conflict of decisions and no important question of federal law.

All of the evidence shows that the Phoenix crew tilted the Phoenix gondola loaded with steel plates toward the Railroad's tracks (66a-71a), that the Broadway Limited was at that very moment approaching (48a, 75a-76a), that the train was brought to an emergency stop to avoid the catastrophe which would have resulted from a collision (70a, 87a, 104a, 215a), and that the normal swaying of the Broadway Limited would have resulted in contact between the train and the gondola had the engineman not taken the action he did (103a-104a, 155a).

The admitted negligence of Phoenix thus created an emergency situation which could have resulted in the wreck of the Broadway Limited and severe injuries to its passengers and crew. Only the action of the Railroad engineman prevented the accident. Being forced to concede the compelling necessity that the train be stopped, Phoenix, with more than three and one-half years to review, measure and calculate, tried in the court below to impose responsibility for the accident upon the Railroad

upon two theories. First, it contended that the Railroad was liable because its engineman should have seen the danger created by the tilted Phoenix gondola at a time when he could have brought the train to a smooth service stop just short of the obstruction (210a). Secondly, it contended that the Railroad was liable because it permitted its fireman to adjust the boiler in the rear of the engine as the Broadway Limited approached the Phoenix plant because, it argued, if he had been in the front of the engine he might have seen the danger in time for the train to be brought to a smooth service stop (213a-214a).

The first contention is directly contrary to the facts proved by every witness. No one estimated that this train could have been brought to a service stop in less than 750 feet and everyone agreed that because the tracks curved to the left and the engineman was on the righthand side of the engine, with 24 feet of the engine cab in front of him and to his left (105a), the engineman could not possibly have seen the obstruction until the train was about 240 feet from it. He obviously, therefore, did not have time even for an emergency stop, let alone a service stop.[9] Moreover, this contention ignores the fact that Hoover's own witness, Engineman Bittner, testified without contradiction that it was his job to get his train stopped "as quick as possible" as soon as he saw the obstruction (91a).

The second contention was conceded by Hoover to be invalid at the trial (118a). Moreover, Hoover proved the invalidity of the theory when his evidence established,

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[9] The suggestion in the petition, at pages 13 and 14, that the engineman might have tried a service application of the brakes before resorting to an emergency application also does not fit the facts of this case. Since the train could not be stopped short of the obstruction with an emergency application of the brakes, increasing the stopping distance by first trying a service application of the brakes before throwing the train into emergency would both have increased the overall stopping distance and made the stop rougher (24a).

without contradiction, that the fireman was acting properly in attending to his duty of adjusting the boiler (98a-99a, 129a). Also, the suggestion overlooks the fact that even if the fireman had been in the front of the engine, he couldn't have seen the gondola until an emergency stop was a necessity.

Moreover, even if on some assumed set of figures and calculations it could now be made to appear that the train might possibly have come to a service stop just short of the tilted gondola,[fn] imposition of liability on the Railroad would assume that the engine crew could have accurately calculated all of the variable factors the instant the engine emerged from under the Dock Street Bridge, including the exact distance between the engine and the Phoenix gondola, the exact speed of the train and its state of acceleration, the makeup and weight of the train and the weather's effect on the tracks and wheels. Instantaneous response from all the equipment and tracks, as well as perfect human reactions and mathematical computations would also have had to be assumed. Even with three and one-half years to look back on the events and make all the necessary mathematical calculations and measurements, the most that can be said is that the gamble might barely have been won. With all the knowledge amassed carefully by Phoenix over the years, much less guessed at in a split second by the Railroad crew, such an outrageous gamble with the lives of the passengers and crew of the Broadway Limited would have been indefensible.

[fn] There is actually no testimony that this train could have been brought to a service stop in as little as 750 feet. Phoenix's expert testified that at 30 miles per hour the train could have come to a stop with a service application in "I should say 750 feet" (174a), but he agreed that a number of variable factors would change this estimate of distance (178a) and that the stopping distance would be greater if the train were accelerating (181a-182a). Hoover's uncontradicted testimony showed that the train was accelerating (32a-33a, 85a, 103a).

Since the opinion of the Pennsylvania Supreme Court on January 2, 1962, Phoenix has, in its motion for reargument there and its petition for a writ of certiorari here, suggested a new argument. Having proved in the trial court that the train was moving 30 to 40 miles per hour and couldn't possibly come to a service stop in less than 750 feet, the petitioners, at page 13 of their petition, argue that the jury should have been permitted to find that the Broadway Limited was traveling at a speed of less than 30 miles per hour and might have been brought to a service stop in less than 400 feet. In addition to the fact that arguments raised and rejected for the first time on a motion for reargument to a state supreme court do not give rise to a right to petition for certiorari (*Radio Station WOW Inc. v. Johnson*, 326 U. S. 120, 128 (1945); see also *Herndon v. Georgia*, 295 U. S. 441, 443 (1935)), the evidence simply does not support the new argument. All of the witnesses agreed that the train was moving 30 to 40 miles per hour (32a, 50a, 35a) and that fact was established by Phoenix's conductor as well as by the Railroad crew. Not one witness said the train was traveling at less than 30 miles per hour. In addition, there is not one word of testimony to suggest that this train could have been brought to a service stop in 400 feet; the minimum estimate given in the testimony for bringing this train to a service stop was 750 feet (174a). Moreover, the engineman testified repeatedly that it actually took 600 feet to bring his train to an emergency stop (86a, 87a, 92a, 93a, 94a); and since it was agreed that a service stop takes a much greater distance than an emergency stop, it is fantasy to speculate that a service stop could have been accomplished in a distance shorter than 600 feet.

The petition, at page 13, states that "the train actually was brought to an emergency stop in about 250 feet." This is not the fact. The evidence is to the contrary. The engineman said it took 600 feet to stop (86a, 87a, 92a, 93a,

94a). Working with piece-meal statistics, as suggested in the petition, produces about the same answer. The engineman said that the engine and two of the cars of his train were past the tilted gondola when the train came to a stop (94a). The other witnesses, including the Phoenix conductor (47a), agreed. Those three Railroad cars plus the Phoenix gondola, at 80 feet each (33a, 102a) total about 320 feet. Since the train was estimated to be 100 to 240 feet west of the gondola when the engineman applied the brakes, the total stopping distance was, even on this basis, within the 400 to 600 feet estimate given by the Railroad's and Phoenix's experts for the *emergency* stopping distance at 30 miles per hour. The petition is also simply wrong when it states that the fireman testified the overall stopping distance of the train to be two and one-half car lengths. The fireman testified that from the time he heard the escape of air (which was his first notice the train was in emergency) until the train came to a stop was six car lengths of eighty feet each, or 480 feet (102a).[1] Even if the petition were correct on its facts, however, the most that it suggests is that with a few weeks added to the few years following the few seconds of the emergency faced by the Railroad crew, Phoenix, with renewed and revised calculations, might be able to figure out the possible saving of a few more feet in its proposal to gamble the lives of the passen-

[1] The fireman said that after the train came to a stop the locomotive, the engine and one tender and one half cars were past the tilted gondola (110a). The petition also states that the conductor estimated an overall stopping distance of 3 car lengths. That is not correct. Trainman MacGregor was 8 or 9 car-place from the engine (134a). He heard the brakes apply in his car and saw the dust and dust around the tracks. The train moved about 3 car lengths after that (136a). To that minimum of 240 feet must be added at least the engineman's reaction time plus the distance the train moved as the brakes were applied, as the air reduction moved rearward through the draft of cars and the witness became aware of the sound and flying dust. The distance moved by the train during these events would make the total emergency stopping distance considerably in excess of 400 feet.

gers and the crew on the Broadway Limited. That would not justify a finding that the crew's conduct, in the instant of emergency, was negligent.

The petition, at page 12, refers to a purported conflict between the decision of the Pennsylvania Supreme Court and some decisions of this Court. There is no such conflict. This Court has consistently held that there must be some evidence of negligence to impose liability upon a railroad under the Federal Employers' Liability Act. There was no evidence of negligence in the present case. This Court has reached the same conclusion in the only factually similar cases presented to it.

In *Herdman v. Pennsylvania R. R.*, 352 U. S. 518 (1957), an employee sued the Railroad under the Federal Employers' Liability Act after he was injured because the train in which he was working made an emergency stop to avoid hitting an automobile at a public crossing. This Court affirmed a directed verdict for the Railroad.

The issue was again before this Court in *New York, New Haven & Hartford R. R. v. Henagan*, 364 U. S. 441 (1960), reversing 272 F. 2d 153 (1st Cir. 1959). In that case an engineman unsuccessfully attempted to stop a train to avoid hitting a woman who stepped onto the railroad tracks at a station. An employee on the train was hurt by the emergency stop and sued the railroad under the Federal Employers' Liability Act. This Court reversed a judgment for the plaintiff.

In *Woodington v. Pennsylvania R. R.*, 236 F. 2d 760 (2d Cir. 1956), cert. denied sub nom. *S. J. Groves & Sons Co. v. Pennsylvania R. R.*, 352 U. S. 970 (1957), an engineman (working as a fireman) brought an F. E. L. A. action for injuries he received when the train on which he was working collided with a crane stalled on the Railroad tracks at a public crossing. The Court of Appeals for the Second Circuit reversed a judgment against the railroad, holding that

it was error for the trial court to have permitted the jury to "find some duty on the part of the engineman to be able to stop the train at any point along the track within the range of its operator's vision in order to avoid the danger of stalled objects lodged on the right of way" (236 F. 2d at 766). This Court denied a petition for a writ of certiorari.

None of the cases cited in the petition is at all inconsistent with the present decision of the Pennsylvania Supreme Court and none is even factually similar.[7]

CONCLUSION.

Hoover's and Phoenix's witnesses established the facts which showed that Phoenix was negligent and the Railroad was not. The decision is not in conflict with any case decided by this or any other court, and does not involve any new application to suits under the Federal Employers' Liability Act. The petition seeks merely to relieve Phoenix from the burden of paying the full amount of the judgment obtained against it for its admitted negligence, in a claim not related to any federal right or obligation, and entered

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[7] **Schultz v. Pennsylvania R. R.**, 350 U. S. 523 (1956), was a Jones Act case where the decedent was required to work on a dark, icy and underpowered boat. In **Rogers v. Missouri Pacific R. R. Co.**, 352 U. S. 500 (1957), an F. E. L. A. plaintiff had fallen from a culvert while working on a railroad section gang. **Webb v. Illinois Central R. Co.**, 352 U. S. 512 (1957), involved a railroad brakeman who slipped on a clinker in the roadbed. In **Harris v. Pennsylvania R. R.**, 361 U. S. 15 (1959), a railroad employee fell on a tie that provided insecure footing because of grease or oil. **Inman v. Baltimore & Ohio R. Co.**, 361 U. S. 138 (1959), held that there was insufficient evidence to justify a finding of negligence where a railroad watchman was struck by an automobile at a crossing. **Davis v. Virginian Railway Co.**, 361 U. S. 354 (1960), involved a claim of a yard conductor injured while working on top of a car with inexperienced help plus a malpractice claim against the railroad's doctor.

in favor of a plaintiff who took no part in the appeal below and who will be unaffected by any action taken in response to this petition. It is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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